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TODD YANTIS, )  
 )  
 Appellant, ) Case No. DISM-01-0021  
 )  
 v. ) FINDINGS OF FACT, CONCLUSIONS OF  
 ) LAW AND ORDER OF THE BOARD  
 )  
 LIQUOR CONTROL BOARD, )  
 )  
 Respondent. )  
 )

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held on March 5 and 6, 2002, and April 10 and 11, 2002, in Walla Walla, Washington. RENÉ EWING, Member, reviewed the record and participated in the decision in this matter. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.3 **Nature of Appeal.** Appellant was dismissed from his Liquor Store Manager position for neglect of duty, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleged that Appellant engaged in time/payroll fraud, falsified his work schedule, and failed to use work time productively; made extensive personal telephone calls using the state telephone system; asked a subordinate female employee if she was wearing panties; and engaged in retaliatory conduct toward a subordinate.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

## II. FINDINGS OF FACT

2.1 Appellant Todd Yantis was a Liquor Store Manager and a permanent employee of Respondent Liquor Control Board (LCB). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on March 13, 2001.

2.2 By letter dated March 1, 2001, Respondent notified Appellant of his dismissal, effective March 20, 2001. Respondent charged Appellant with neglect of duty, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleged, in part, that Appellant:

1. engaged in time/payroll fraud, work schedule falsification, and failed to use work time productively,
2. abused the state telephone system by making extensive personal phone calls,
3. asked a female subordinate whether she was wearing any panties, and
4. engaged in retaliatory conduct after the LCB began investigating sexual harassment allegations made against him by a female subordinate.

2.3 Respondent also alleged that Appellant failed to provide good customer service; discussed his personal life with staff, made threatening and retaliatory statements to subordinates and others, forced a subordinate to sign a statement that she disagreed with, and made angry, insulting remarks to a subordinate; and deliberately failed to keep confidential an investigation of harassment and hostile working conditions. However, at the outset of the hearing on this appeal, Respondent stated that the agency would present evidence only on items 1 through 4 listed above.

1 2.4 Appellant had been employed by LCB for approximately 15 years. He began his employment as  
2 a clerk and promoted to an Assistant Manager position. On May 1, 1988, he promoted to the Liquor  
3 Store Manager position at store #164 in Walla Walla.

4 2.5 Appellant received training in management principles, interpersonal relationships, and sexual  
5 harassment. Furthermore, he was aware of the LCB's policies and procedures governing liquor store  
6 operations. Appellant's performance evaluations indicate that his performance met or exceeded normal  
7 expectations. In addition, Appellant received positive monthly reviews from his supervisor.  
8

9 2.6 LCB has two liquor stores in the Walla Walla area, store #164 and store #9. During early 1999,  
10 store #164 was remodeled. The remodel included the installation of new flooring. The flooring was  
11 incorrectly installed which result in an air quality problem in the store. Brenda Brown, Assistant  
12 Manager of store #164, was unable to work in the store until the problem was remedied. Therefore, she  
13 worked in store #9 until the problem was resolved. Connie McBain was the manager of store #9.  
14

15 *Allegation 1:*

16 2.7 On June 23, 1999, Janice Torge, Operations Investigator for the LCB Loss Prevention  
17 Department, conducted unannounced operations inspections of stores #9 and #164. She stopped at store  
18 #9 first and talked with Ms. McBain. Ms. McBain complained that Appellant had not been accurately  
19 reporting his work hours. Ms. Torge then went to store #164 and talked with Ms. Brown. Appellant  
20 was not in the store during Ms. Torge's discussion with Ms. Brown. Ms. Brown complained that  
21 Appellant did not accurately report his work time on the posted schedule. Ms. Brown also raised  
22 concerns about Appellant mishandling damaged merchandise, mishandling laundry charges, using the  
23 telephone for personal phone calls and failing to do performance evaluations for staff at the store. In  
24 addition, Ms. Brown alleged that Appellant engaged in harassment at the store. Ms. McBain and Ms.  
25 Brown alleged that Appellant's misconduct had been on going for years, that they had made  
26 management aware of their concerns and that no action had been taken to correct Appellant's behavior.

1 2.8 On July 15, 1999, Ms. Torge reported to Laurel Lewellen, Security and Loss Prevention  
2 Manager, the information Ms. Brown and Ms. McBain provided. As a result, an investigation was  
3 conduct by the Loss Prevention staff. The investigation included reviewing phone, payroll and time  
4 records, interviewing staff and installing covert cameras in store #164.

5  
6 2.9 The investigation revealed that between August 9 and September 3, 2000, Appellant failed to  
7 accurately sign in and out of the store and that he left the store during the work day without  
8 documenting his whereabouts on the work schedule. Respondent alleged that Appellant inaccurately  
9 reported 15.9 hours as work time when he was away from the store. The investigation also revealed that  
10 between August 9 and September 3, 2000, Appellant used work time to conduct personal business such  
11 as writing personal checks, eating and grooming. Appellant also read the newspaper during work time.  
12 Appellant engaged in these activities for approximately 5.3 hours during this time period.

13  
14 2.10 The LCB Store Procedure Manual, Chapter 5, Section 3.3, addresses changes to the work  
15 schedule. The procedure states, in relevant part:

16 Changes made and approved by management after the scheduled is posted shall be noted  
17 with an asterisk in the "Sc" block on the face of the work schedule and explained on the  
back. Do not otherwise change the original schedule.

18 2.11 The Store Procedure Manual, Chapter 5, Section 3.4, also addresses the work schedule and  
19 states, in relevant part:

20 The completed schedule includes the above plus employee's recording of actual time  
21 worked and lunchtime taken. Employees will record in ink, their actual time worked and  
will record only for themselves:

22 a. AW - Time, by the clock, to the nearest minute that work commenced and was  
completed:

23 . . .

24 c. . . . Duty time away from the store is considered time worked, and must be  
recorded on the work schedule.

25 d. The actual time away from the store for transfers, banking, or other store related  
duties will be recorded on the schedule.

- e. Any unusual circumstances for arriving or leaving other than the scheduled times will be noted on the back of the work schedule.
- f. Time will be compensated for when the circumstance is unusual and work related.

2.12 The Store Procedure Manual, Chapter 5, Section 5.4, addresses the work shift and states, in relevant part:

Each employee has certain scheduling and work rights and those rights are also the obligation of the employee.

- a. the employee has the obligation to work all assigned shifts, including overtime, unless leave or other arrangements are approved by management.

2.13 The Store Procedure Manual, Chapter 5, Section 5.7a, addresses breaks and states, in relevant part:

Rest breaks cannot be combined with lunch breaks or at the beginning and ending of the work shift to allow late arrival or early departure. Late arrival or early departure from the scheduled work shift must be covered by the appropriate leave to the nearest tenth of an hour.

2.14 The employees of store #164 elected not to take lunch breaks but were authorized to take appropriate rest breaks, depending on the length of their scheduled work shift. Appellant was authorized to take two fifteen-minute rest breaks per day. Store procedures do not require that rest breaks be recorded on the work schedule.

2.15 A preponderance of the credible testimony established that Brian Johnson, Appellant's supervisor, had given Appellant approval to "pool" his two fifteen-minute rest breaks and to use them during the afternoon for childcare purposes. A preponderance of the credible testimony also established that Appellant conducted store business while he was away from the store, such as banking, paying bills, shopping for display items, and shopping for a new refrigerator, but that he did not consistently record his time away from the store or his work related activities on the work schedule.

2.16 A preponderance of the credible testimony also established that Appellant read the newspaper during work time to check the prices of wine at other establishments, to check on upcoming community

1 activities that could impact the sale of alcohol at the store, and to check sale prices for the purchase of a  
2 new store refrigerator.

3 *Allegation 2:*

4 2.17 During the course of his employment with LCB, Appellant began a personal relationship with  
5 Megan Rondeau. Ms. Rondeau was an administrative assistant in the LCB human resource office in  
6 Olympia.

7  
8 2.18 The investigation initiated by Ms. Torge revealed that between June 15, 1995, and July 1998,  
9 14.4 hours of phone calls were made from store #164 to the human resource office phone Ms. Rondeau  
10 shared with another employee, Shannon Reuell. The phone in store #164 was available for any of the  
11 staff to use. Staff was not prohibited from calling the Olympia human resource office for  
12 employment/work related purposes. The investigation also showed that between July 15, 1995, and July  
13 1998, 4.8 hours of phone calls were made from Ms. Rondeau and Ms. Reuell's phone to store #164.

14 2.19 The Store Procedure Manual, Chapter 5, Section 6, addresses the use of the store telephone and  
15 states that the "store telephone line will be kept open for business."

16  
17 2.20 The Store Procedure Manual, Chapter 5, Section 1.4, also addresses use of the store telephone  
18 and states, in relevant part, "[a]ll personal long distance calls must be charged to the employee's home  
19 phone or calling card."

20  
21 *Allegation 3:*

22 2.21 On July 13, 1999, Ms. Brown submitted a written complaint to Ermelindo Escobedo, LCB's  
23 Diversity Program Manager. In summary, Ms. Brown alleged that Appellant created a negative  
24 environment in store #164 and that he allowed and participated in sexually explicit comments. Mr.  
25 Escobedo began an investigation into Ms. Brown's complaints.

1 2.22 A preponderance of the credible testimony and evidence establishes that in store #164, all staff,  
2 including Ms. Brown, and customers engaged in banter consisting of jokes with sexual overtones.

3 2.23 On September 30, 1999, Ms. Brown contacted Ms. Torge and reported that on September 28,  
4 1999, Appellant asked her if she was wearing any panties because he did not see any panty lines.  
5 Appellant and Ms. Brown were alone in store #164 when this comment was allegedly made.  
6

7 2.24 Appellant denies making this comment. Ms. Brown testified that this was the first time that  
8 Appellant had made this type of comment to her.

9 2.25 The Board must carefully weigh the credibility of Appellant and Ms. Brown in determining  
10 whether Appellant made this comment. Appellant did not have a history of making this type of  
11 comment. However, Ms. Brown had a history of complaining about Appellant and questioning his  
12 ability to manage the store. Ms. Brown voiced her concerns to co-workers and peers, including Ms.  
13 McBain. In addition, Appellant provided persuasive testimony from Virginia Rider, a handwriting  
14 expert, that Ms. Brown may have forged a customer comment card complaining about Appellant.  
15 Furthermore, less than two months after Appellant's dismissal, Ms. Brown became the acting manager  
16 and then the manager of store #164. After considering all the evidence and testimony presented to the  
17 Board, and weighing the credibility of the witnesses, we find that the Appellant did not make the  
18 statement Ms. Brown attributed to him.  
19

20 *Allegation 4:*

21 2.26 By e-mail dated November 15, 1999, Appellant's supervisor, Brian Johnson, directed Appellant  
22 to maintain strict confidentiality regarding Ms. Brown's July 13, 1999, complaint. Mr. Johnson also told  
23 Appellant not to take any corrective action that could be construed as retaliation.

24 2.27 On December 23, 1999, Ms. Brown submitted a written complaint to Mr. Escobedo alleging that  
25 Appellant had retaliated against her for filing the July 13, 1999, complaint. Ms. Brown alleged that on  
26

1 December 15, 1999, Appellant began questioning her about recent errors she made. Ms. Brown alleged  
2 that Appellant yelled at her. Ms. Brown also alleged that since November 1998, Appellant had engaged  
3 in a pattern of retaliation against her.

4 2.28 A preponderance of the credibility testimony establishes that on December 15, 1999, Ms. Brown  
5 made an error in an order for a Class H license customer and she made an error by throwing away a  
6 debit receipt. The prior week, she made the same error in throwing away a debit receipt. On December  
7 23, 1999, Appellant talked to Ms. Brown about her errors. Ms. Brown apologized and asked what  
8 Appellant wanted her to do about it. Both Appellant and Ms. Brown raised their voices. The  
9 conversation began in the front office, an area that is surrounded by a half wall and is visible to  
10 customers and employees in the store. Appellant asked Ms. Brown to accompany him to the lunchroom  
11 so that they could continue their discussion in private. Ms. Brown complied and they concluded their  
12 conversation in the lunchroom.

13 2.29 Kristina Douglas was the clerk on duty in store #164 when these events occurred. Ms. Douglas  
14 credibly testified that Appellant did not appear to be upset when he first approached Ms. Brown about  
15 her errors. However, each time Appellant asked Ms. Brown a question and she responded, Ms. Brown's  
16 level of tension increased. When Appellant and Ms. Brown were in the lunchroom, Ms. Douglas heard  
17 raised voices. The conversation in the lunchroom lasted approximately five minutes. Ms. Brown was  
18 upset by the conversation. Appellant apologized to Ms. Douglas because he knew that she was  
19 uncomfortable about witnessing the incident.

20  
21 2.30 As the store manager, Appellant was responsible for correcting errors made by store employees.  
22 Ms. Brown admits that she made the errors that were the subject of the December 23, 1999,  
23 conversation.

24 2.31 Gary Ferko was the Deputy Director of Retail Services and Appellant's appointing authority.  
25 Mr. Ferko reviewed the information from each of the three investigations, talked to Appellant's  
26



1 supervisor, viewed the video tapes from the surveillance cameras, and met on more than one occasion  
2 with Appellant and his representative. After considering all of the information, Mr. Ferko determined  
3 that Appellant neglected his duty, was insubordinate, willfully violated agency policies, and that his  
4 behavior rose to the level of gross misconduct.

5 2.32 Mr. Ferko found that Appellant was aware of agency policies and procedures and that he had  
6 received appropriate management training. Based on what he considered a small snapshot in time that  
7 was representative of Appellant's pattern of behavior, Mr. Ferko determined that he failed to fulfill the  
8 duties of a store manager and failed to act as role model for employees. Mr. Ferko found that Appellant  
9 spent his time at his desk instead of working in the store, that he attended to personal activities during  
10 work time, and that he left the store without signing out. Mr. Ferko determined that Appellant engaged  
11 in a pattern of telephone abuse by utilizing the state telephone system for personal reasons, that he  
12 inappropriately pooled his breaks, and that he engaged in harassment and retaliation. Mr. Ferko  
13 concluded that Appellant's unprofessional conduct severely damaged his credibility, integrity and the  
14 trust the agency placed him and that his failure to follow policies and procedures adversely affected the  
15 safe and efficient operations of store #164. As a result, Mr. Ferko determined that dismissal was the  
16 appropriate disciplinary sanction.

### 17 18 **III. ARGUMENTS OF THE PARTIES**

19 3.1 Respondent argues that Appellant engaged in time fraud, which alone supports the sanction of  
20 dismissal. Respondent contends that Appellant came and went as he pleased, that he had no legitimate  
21 business reasons to be out of the store as often as he was, that he signed in and out when it was  
22 convenient for him, and that he was not productive when he was in the store. Respondent further argues  
23 that Appellant engaged in personal activities during work time, that he used the state phone system to  
24 pursue a personal relationship with Ms. Rondeau, and that he engaged in harassment and retaliation of  
25 subordinates. Respondent contends that Appellant failed to comply with agency policies and  
26

1 procedures, failed to perform his duties as a store manager, breached the trust placed in him by the  
2 agency, and irreparably damaged his ability to work for the agency.

3 3.2 Appellant admits that he did not follow procedures for filling out the work schedule but argues  
4 that he followed the same practice for years and that his supervisor, in spite of monthly store reviews,  
5 never corrected his of keeping records. Appellant contends that his absences from the store during his  
6 scheduled work hours were for legitimate business purposes. Appellant asserts that the charge in regard  
7 to telephone usage was stale, that the evidence was non-conclusive, and that Respondent failed to prove  
8 that he made all of the calls. Appellant contends that there are legitimate reasons why any employee  
9 might be calling the personnel office. Appellant acknowledges that he did call Ms. Rondeau's work  
10 number during the time in question, but asserts that Ms. Rondeau would then transfer his call to the  
11 appropriate person. Appellant asserts that the calls he made to Ms. Rondeau were for business purposes.  
12 Appellant contends that Ms. Brown was motivated to raise false allegations of harassment and  
13 retaliation against him as a result of tension in store #164 because of the health problems created by the  
14 remodel. Appellant contends that after the air problems were corrected in store #164, Ms. Brown felt  
15 pressured to return to work before she wanted to. Appellant further contends that as the store manager,  
16 it was his responsibility to bring Ms. Brown's errors to her attention, but that does not constitute  
17 retaliation. Appellant contends that store #164 was a productive, well-run store, that his work never  
18 went unattended, that he never failed to provide service to customers and that the deminimus personal  
19 activities he engaged in during work time did not adversely impact the store. Appellant argues that he  
20 was never counseled or given notice that he was filling out work schedules incorrectly, that Respondent  
21 failed to follow a course of progressive discipline, that Respondent failed to promptly respond to the  
22 allegations of misconduct, and that Respondent bungled the pre-disciplinary process. Appellant asserts  
23 that the charges and memories of witnesses are stale, that because the actions of the agency prejudiced  
24 his ability to respond to the charges, it is unfair to impose termination on him.

#### IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995).

4.5 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

4.6 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.7 Respondent has met its burden of proof that Appellant failed to comply with agency policies and procedures. Appellant was aware of his responsibility to keep accurate records. Yet, Appellant

1 admittedly failed to document his time and activities when out of the store during work hours. The  
2 credible evidence and testimony establish that Appellant was engaged in legitimate store business some  
3 of the time that he was out of the store. In addition, the record before Board establishes that Appellant  
4 had permission to pool his breaks for childcare purposes. Pooling of breaks for this purpose is not  
5 prohibited by agency policy. While we find that Appellant neglected his duty and violated agency  
6 policies, we do not find that this violation constituted time or payroll fraud.

7  
8 4.8 In addition, Respondent met its burden of proof that Appellant engaged in personal activities  
9 during work time. These activities included eating, grooming, paying personal bills and working on his  
10 personal check book. However, during the times shown on the video, Appellant also engaged in  
11 legitimate store business. We find that Appellant neglected his duty and violated agency policies and  
12 procedures when he engaged in personal activities during work hours. However, these activities did not  
13 adversely impact the overall operation of productivity of the store, did not constitute failure to use work  
14 time productively and do not rise to a level of misconduct that warrants dismissal.

15 4.9 Respondent failed to meet its burden of proof that Appellant abused the state telephone system  
16 by making extensive personal phone calls. First, this charge is stale and it would be impossible for any  
17 employee to recall each and every telephone call made during the course of business during a three-year  
18 period. Furthermore, Respondent failed to establish that Appellant made each of these calls or that he  
19 spoke only with Ms. Rondeau when he did make calls. Respondent failed to prove this charge by a  
20 preponderance of credible evidence.

21 4.10 Respondent failed to prove by a preponderance of the credible evidence that Appellant engaged  
22 in harassment or retaliation toward Ms. Brown or that he was insubordinate. We conclude that more  
23 likely than not, Ms. Brown engaged in pattern of behavior and interactions with other staff designed to  
24 discredit Appellant and that she fabricated the allegations for her personal gain.  
25  
26

1 4.11 In light of the totality of the proven facts and circumstances, Appellant should be disciplined for  
2 failing to comply with agency policies and procedures regarding work schedules and payroll records.  
3 Given Appellant's training and years of experience as a manager, a severe disciplinary is warranted.  
4 Therefore, Appellant should be given thirty-day suspension without pay. The appeal should be granted  
5 in part and the disciplinary sanction of dismissal should be modified.

6  
7 **V. ORDER**

8 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Todd Yantis is granted in part and  
9 the disciplinary sanction is modified to a thirty-day suspension without pay.

10 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

11 WASHINGTON STATE PERSONNEL APPEALS BOARD

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13 \_\_\_\_\_  
14 Gerald L. Morgen, Vice Chair

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16 René Ewing, Member  
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